

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

2006 Quadrennial Regulatory Review - Review of)	MB Docket No. 06-121
the Commission's Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to Section 202)	
of the Telecommunications Act of 1996)	
)	
2002 Biennial Regulatory Review - Review of)	MB Docket No. 02-277
the Commission's Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to Section 202)	
of the Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning)	MM Docket No. 01-317
Multiple Ownership of Radio Broadcast)	
Stations in Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

To: The Commission

**COMMENTS
OF
THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.
AND
THE RAINBOW/PUSH COALITION, INC.**

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EXECUTIVE SUMMARY

The National Association of Black Owned Broadcasters, Inc. (“NABOB”) and Rainbow/PUSH Coalition (“Rainbow/PUSH”), submit these Comments as part of our ongoing effort to persuade the Commission to take action, rather than merely provide lip-service, to the adoption of policies and rules that will promote ownership of broadcast facilities by minorities. The Third Circuit Court of Appeal’s remand of the Commission’s 2003 Order, that would have further relaxed its media ownership rules, demonstrates that NABOB and Rainbow/PUSH were correct in our Petition for Reconsideration advising the Commission that its decision lacked a factual and legal basis and would further the steady decline in the number of minority owned broadcasting companies.

NABOB and Rainbow/PUSH submit that, in light of the Court’s remand, the Commission must: (1) revise and reissue the FNPRM in this proceeding, as explained in the Motion filed by MMTC; (2) expand and update the record with studies addressing the negative impact of the Commission’s existing rules and the probable future impact of the Commission’s proposed rule changes on minority ownership. Because the Commission lacks an adequate record for responding to the Court’s remand order, the Commission cannot adopt changes to its ownership rules based upon the comments that are filed in this proceeding, until the Commission does the required studies and provides the public an opportunity to review and comment on those studies.

The Commission must also consider the issues raised in NABOB and Rainbow/PUSH’s Petition for Reconsideration. In particular, the Commission should review NABOB and Rainbow/PUSH’s request for reconsideration of the decision to eliminate review of market share information in radio assignment and transfer cases. The Commission’s decision to no longer

consider market share information was one of the principal flaws in the Commission's 2003 Order identified by the Court. In our Petition for Reconsideration, NABOB and Rainbow/PUSH showed that there is overwhelming evidence in the record justifying retaining the market share review procedure known as "flagging." The Court's decision supports this conclusion.

The principal points raised in the Petition for Reconsideration are:

1. The Commission should adopt policies to promote minority ownership in this proceeding, not in a separate proceeding to be instituted at some unspecified date.
2. The Commission should require divestiture of radio ownership clusters that exceed the local radio ownership rules and should not grandfather these clusters.
3. If the Commission does not eliminate its grandfathering policy, the Commission should allow minority owned companies to own stations equal to the number of stations owned by the largest group owner in the market.
4. If the Commission does not eliminate its grandfathering policy, it should allow station clusters to be sold to minority owned companies, regardless of the size of the minority owned company.
5. The Commission should retain its policy of "flagging" transactions which exceed the 50/70 threshold for market concentration.
6. The Commission should not count noncommercial stations in determining the number of stations in a local radio market.
7. The Commission should not relax its ownership rules to allow greater combinations of radio, television, and newspaper ownership.

These issues should all be addressed in this proceeding.

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The National Association of Black Owned Broadcasters, Inc. ("NABOB") and Rainbow/PUSH Coalition, Inc. ("Rainbow/PUSH"), by their attorneys, hereby submit their Comments in the above-captioned proceedings.

I. INTRODUCTION

NABOB and Rainbow/PUSH participated in this proceeding in 2003, and, as the Commission noted in the Further Notice of Proposed Rule Making,¹ have a Petition for Reconsideration that was filed on September 4, 2003, pending in this proceeding. NABOB and Rainbow/PUSH also filed Comments and Reply Comments in this proceeding in 2003. What NABOB and Rainbow/PUSH experienced first hand in this proceeding, is precisely what the Third Circuit Court of Appeals recognized in its decision in *Prometheus Radio Project v. Federal Communications Commission*² – the Commission failed to “justify its decisions with reasoned analysis.”³

NABOB and Rainbow/PUSH have seen the Commission ignore clear evidence that its rules adopted in 1996 have had a negative impact on minority ownership of broadcast facilities, and ignore clear evidence that the rule changes it adopted in 2003 would further exacerbate the decline in minority ownership. NABOB and Rainbow/PUSH have seen the Commission give little or no consideration to the negative impact its current rules, and the proposed rules adopted in 2003, would have on minority ownership of broadcast facilities. NABOB and Rainbow/PUSH had most of our suggestions for preserving and promoting minority ownership completely ignored. Instead, the Commission merely stated that it would consider minority ownership issues at some unspecified time

¹ *In the Matter of 2006 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 06-93, MB Docket Nos. 06-121, 02-277, 01-235, 01-317, 00-244, at par36 and Appendix A (“FNPRM”).

² 373 F.3d 372 (2004).

³ 373 F.3d at 436.

in the future.⁴ This refusal to consider the effect of its rule changes on minority ownership was one of the reasons the Third Court of Appeals remanded the Commission's 2003 Order back to the Commission.⁵

NABOB and Rainbow/PUSH submit that, because of the deficiencies in the Commission's order identified by the Third Circuit Court of Appeals, it is not possible to issue any revisions to its ownership rules based upon comments received at this stage of the proceeding. The Commission must: (1) correct the deficiencies in the FNPRM, (2) develop studies and a record that respond to the flaws identified by the Court, and (3) review the record of the 2003 proceeding for factual information overlooked by the Commission in 2003, including the evidence demonstrating that the Commission should have retained its market share analysis for radio assignment and transfer cases, a flaw specifically identified by the Court.

II. THE COMMISSION MUST CORRECT THE DEFICIENCIES IN THE FNPRM

On remand the Commission has the clear burden of developing a record and a set of rules that will adequately respond to the flaws found by the Court. In order to develop an adequate record, the Commission must begin by addressing the issues raised by the MMTC Motion filed on August 23, 2006, in which, MMTC pointed out the deficiencies in the FNPRM in this proceeding.⁶ MMTC

⁴ *In the Matter of 2002 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, MB Docket Nos. 02-277, 01-235, 01-317, 00-244, at pars. 47-50 ("2003 Order").

⁵ 373 F.3d at 421, n59.

⁶ Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice, filed by MMTC, August 23, 2006, in this proceeding.

demonstrated that the FNPRM (1) fails to identify and describe the minority ownership proposal remanded by the Third Circuit, (2) fails to seek comment on a definition of socially and economically disadvantaged business (“SDB”), and (3) it fails to cite Section 257 of the Telecommunications Act, 47 U.S.C. Section 257, as a source of authority for the actions that may be taken in this proceeding to promote minority ownership. As explained by MMTC, the Commission must issue a revised FNPRM to rectify these deficiencies.

III. THE COMMISSION MUST DEVELOP A RECORD FROM WHICH IT CAN ADDRESS THE FLAWS FOUND BY THE THIRD CIRCUIT COURT OF APPEALS

In remanding the 2003 Order to the Commission, the Third Circuit Court of Appeals held, with respect to the Commission’s elimination of the Failed Station Solicitation Rule (“FSSR”), that:

By failing to mention anything about the effect this change would have on potential station owners, the Commission has not provided a ‘reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’ [citations omitted] Furthermore, while the Commission had promised in 1999 to ‘expand opportunities for minorities and women to enter the broadcast industry,’ [citation omitted] the FSSR remained its only policy specifically aimed at fostering minority television station ownership. In repealing the FSSR without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR) the Commission ‘entirely failed to consider an important aspect of the problem, and this amounts to arbitrary and capricious rulemaking.’⁷

Thus, by pointing to the Commission’s unfulfilled promise in 1999 to expand opportunities for minorities and women, the Court recognized a pattern of neglect with respect to the Commission’s attitude toward expanding opportunities for minorities and women. The Court then added that the Commission deferred consideration of MMTC’s proposal’s for advancing minority

⁷ 373 F.3d at 421-422.

and disadvantaged business ownership of broadcast facilities. The Court then directed the Commission to address these proposals as part of the remand.⁸

The Court went on to point out that the Commission's analysis attempting to justify its revised cross ownership limits and numerical local ownership limits for radio and television stations were fatally flawed. The Court concluded:

The Commission's derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio ownership in local markets, all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets. We thus remand for the Commission to justify or modify its approach to setting numerical limits. We also remand for the Commission to reconsider or better explain its decision to repeal the FSSR.⁹

In order to appropriately comply with the Court's remand decision, the Commission must use an analysis that takes into account market share. In addition, the Commission must develop additional studies to assess the impact of its current rules and any proposed rules on minority ownership. In a news release issued on June 21, 2006,¹⁰ the Commission announced that it will do some additional studies in this proceeding. However, the studies announced fall far short of what is needed.

A distinguished group of academics has developed a detailed list of additional studies that must be undertaken before the Commission will be in a position to adequately address the issues remanded by the Court. With respect to the development of the record of the impact of the rule

⁸ *Id.* at 422, n. 59. Indeed, the proposals of NABOB and Rainbow/PUSH were also ignored by the Commission. 2003 Order, 18 FCC Rcd 13620 at par. 47-50.

⁹ 373 F.3d at 436.

¹⁰ "FCC Opens Media Ownership Proceeding for Public Comment, News Release, June 21, 2006.

changes on minority ownership opportunities, the academics proposed the following:

The FCC should also look at the effect of consolidation on minority and female ownership. In consolidated markets, has minority or female ownership increased or decreased? The September 2006 study by Freepress, “Out of the Picture: Minority & Female TV Station Ownership in the United States, Current Status, Comparative Statistical Analysis & the Effects of FCC Policy and Media Consolidation,” found that television markets with minority owners are significantly less concentrated than markets without minority owners. Freepress’ analysis of television ownership also found that markets that saw the addition of new minority owned stations since 1988 are significantly less concentrated than markets that did not gain new minority owners. The Freepress study also suggested the FCC conduct a comprehensive study of every licensed broadcast radio and television station to determine the level of female and minority ownership, examining changes since 1999, focusing on station format and content including local news, and analyzing the effect of consolidated markets on minority and female ownership. An FCC study of market concentration and minority and female ownership in radio similar to that conducted by Freepress of market concentration for television markets would yield useful data in examining the effects of consolidation policies since the passage of the Telecommunications Act of 1996.

The FCC study should examine factors that influenced minority and women owners’ decisions to buy or sell stations since the Telecommunications Act of 1996, including ownership consolidation, major mergers with spinoffs, capital markets and access to capital. The study should also seek information on the effect of consolidation on advertising prices. Many minority owners allege that some consolidators will sell advertisements on their African-American formatted stations for \$1 in a package with their other stations (a dollar a holler), making competition impossible for minority and small entrepreneurs who cannot amortize their costs across several stations in a market or across several markets. The study should also examine the interaction of consolidation with the practices in the advertising industry that pay broadcasters with minority formats or minority audiences less than those with non-minority formats or audiences. Such practices result in lower cash flows for stations which program in minority-oriented formats and serve predominantly minority audiences, making it more difficult to attract financing needed to buy other stations and creating disincentives to provide such programming. [footnotes omitted]¹¹

Until the Commission addresses the deficiencies in the FNPRM and completes all of the studies needed to develop a full record in this proceeding, it will not be in a position to adequately

¹¹Comments, dated October 23, 2006, from Catherine J.K. Sandoval, et al, filed in this proceeding.

and properly respond to the Court's remand decision.

**IV. THE RECORD BEFORE THE COMMISSION IN 2003 SUPPORTED THE
RECOMMENDATIONS OF NABOB AND RAINBOW/PUSH**

As noted above, NABOB and Rainbow/PUSH have a Petition for Reconsideration pending in this proceeding from 2003. NABOB and Rainbow/PUSH submit that, in order to comply with the Court's remand decision, the Commission must expand and update the record in this proceeding, and NABOB and Rainbow/PUSH have suggested above some of the additional information that must be developed in that record. However, NABOB and Rainbow/PUSH submit that the record developed by the Commission in 2003 was adequate to support the recommendations made by NABOB and Rainbow/PUSH at that time. Many of those recommendations were included in NABOB and Rainbow/PUSH's Petition for Reconsideration. As our Petition for Reconsideration is still pending, NABOB and Rainbow/PUSH will not repeat all of the arguments and proposals submitted in the Petition for Reconsideration, although we continue to request Commission consideration of all points raised in the Petition.

**V. THE RECORD IN 2003 SUPPORTED THE RETENTION OF A MARKET
SHARE TEST FOR THE LOCAL RADIO OWNERSHIP RULE**

In light of the Court's remand decision, one of the positions taken in NABOB and Rainbow/PUSH's Petition for Reconsideration merits restating in these Comments. In the Petition for Reconsideration, NABOB and Rainbow/PUSH requested reconsideration of the Commission's decision to no longer consider market share when reviewing proposed radio station acquisitions. The Third Circuit Court of Appeals identified the Commission's decision to no longer consider market

share when reviewing radio transactions to be a major deficiency in the Commission's 2003 order.¹² NABOB and Rainbow/PUSH demonstrated in 2003 that the record justified retaining the market share test.

NABOB and Rainbow/PUSH showed that the Commission should retain its policy of "flagging" transactions which raise questions regarding excessive concentration of media ownership in a local radio market. The Commission's interim policy for processing radio transactions that would result in one owner controlling more than 50% of local radio market revenues, or two owners controlling more than 70% of local radio market revenues, worked very well in informing the public about potential excessive concentration and allowing the public to comment. The Commission identified numerous transactions which triggered the flagging process. The mere number of transactions which triggered the process was clear evidence of the need for the policy. In fact, NABOB and Rainbow/PUSH presented evidence demonstrating that the Commission would be justified in flagging all transactions which failed to meet a 40/60 flagging standard.

Yet, the Commission concluded that the flagging policy is no longer necessary. However, the Commission provided no adequate explanation for eliminating the policy. The Commission merely stated that application of the Arbitron market definition to the local radio ownership rule would eliminate the need for the flagging procedure. The record clearly demonstrated otherwise. As Commissioner Adelstein pointed out in his dissenting statement, the revenue share of the top owner in a local market now averages 47 percent, and the two largest firms average 74 percent.¹³

Given these average figures, it is clear that there are many markets in which the largest owner

¹² 373 F.3d at 435.

¹³ 2003 Order, Separate Statement of Commissioner Jonathan S. Adelstein Dissenting ("Adelstein Dissent") at p.10, citing Media Ownership Working Group ("MOWG") Study No. 11.

often exceeds the 50% threshold, and in most markets the two largest owners regularly exceed the 70% threshold. When the Commission adopted the flagging procedure in 1998, it did so to identify overly concentrated radio markets. The Commission failed to explain what has changed in the radio marketplace in this brief period of time such that the 50/70 flagging procedure is no longer necessary. Indeed, given the extensive record evidence of even greater consolidation in the radio market, the record demonstrated that the 50/70 flagging procedure is needed now more than it was when it was adopted by the Commission in 1998. As noted above, the record actually supports a 40/60 flagging policy.

The Third Circuit Court of Appeals has now ruled that the Commission's numerical local ownership rule is no substitute for a market share analysis. The flagging procedure provided the type of market share analysis the Court described. The numerical local ownership rule is a means for preventing over concentration in general. The flagging procedure identifies specific instances of over concentration and invites public comment. The two procedures are not mutually exclusive, but rather are complementary. Thus, a return to the flagging procedure would address precisely the problem the Court identified.

Because the record in 2003 demonstrated that the Commission should have continued to consider market share in radio assignment and transfer cases, the Commission is in a position to rectify this flaw in its 2003 Order found by the Court simply by updating the record developed in 2003 and reinstating the "flagging" policy.

VI. THE COMMISSION SHOULD ADDRESS THE ISSUES RAISED IN NABOB AND RAINBOW/PUSH'S PETITION FOR RECONSIDERATION

In our Petition for Reconsideration, NABOB and Rainbow/PUSH raised numerous issues that are still ripe for decision in this proceeding. Those issues are:

1. The Commission should adopt policies to promote minority ownership in this proceeding, not in a separate proceeding to be instituted at some unspecified date.
2. The Commission should require divestiture of radio ownership clusters that exceed the local radio ownership rules and should not grandfather these clusters.
3. If the Commission does not eliminate its grandfathering policy, the Commission should allow minority owned companies to own stations equal to the number of stations owned by the largest group owner in the market.
4. If the Commission does not eliminate its grandfathering policy, it should allow station clusters to be sold to minority owned companies, regardless of the size of the minority owned company.
5. The Commission should retain its policy of “flagging” transactions which exceed the 50/70 threshold for market concentration.
6. The Commission should not count noncommercial stations in determining the number of stations in a local radio market.
7. The Commission should not relax its ownership rules to allow greater combinations of radio, television, and newspaper ownership.

NABOB and Rainbow/PUSH also pointed out in our Petition for Reconsideration that the U.S. Supreme Court's decision in *Grutter v. Bollinger* eliminates any impediment to adopting rules

to promote minority ownership.¹⁴ Although there was never any precedent prohibiting the Commission from taking steps to promote minority ownership, the Commission had shied away from such policies after the Supreme Court's *Adarand* decision.¹⁵ The Supreme Court's decision in *Grutter v. Bollinger* clearly permits the Commission to consider such policies now.

We also pointed out that previously, in our Comments, NABOB and Rainbow/PUSH stated that the Commission should adopt promotion of minority ownership of broadcast facilities as a primary policy objective in this proceeding. We stated that, among the steps which the Commission should take to promote diversity of ownership and minority ownership, are the following:

1. As a part of its public interest review, the Commission should assess the impact on minority ownership of all assignment of license and transfer of control applications.
2. The Commission should eliminate its policy of granting 6, 12 and 18 month waivers of the broadcast ownership rules, which waivers are ostensibly to allow parties exceeding the rules to find potential buyers. Applications to sell stations to third party buyers should be filed simultaneously with the underlying assignment and transfer applications. The Commission's approach to granting waivers has been so exploited by the large group owners as to make the current ownership rules "window dressing."
3. The Commission should make permanent, with the revisions proposed in our Comments, the Commission's Interim Policy for processing assignment and transfer applications. In particular, the Commission should consider a 40/60 market share

¹⁴*Grutter v. Bollinger*, 123 S. Ct. 2325, 71 USLW 4498 (2003).

¹⁵*Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

screen for “flagging” potential excessive consolidation in a market, instead of the current 50/70 screen.

4. The Commission should change its radio market definition to correlate with the Arbitron market, because the current rule has allowed a single entity to own between 9 and 12 radio stations in, at least, 11 Arbitron metro markets.
5. The Commission should treat all Local Marketing Agreements as attributable interests.
6. The Commission should continue to urge Congress to reinstate the minority tax certificate policy.¹⁶

In our Comments, NABOB and Rainbow/PUSH cited several studies demonstrating that, since the enactment of the Telecommunications Act of 1996, the number of minority owners in the radio industry has decreased by 14%.¹⁷ We showed that the Radio Local Market Study demonstrates that the 50/70 screen for “flagging” market over-consolidation is too loose. The Radio Local Market Study data would support a 40/60 screen, instead of the current 50/70 screen.¹⁸

We cited studies demonstrating that diversity of viewpoint is best promoted by diversity of ownership, and that minority ownership best promotes viewpoint diversity.¹⁹ The Commission’s

¹⁶NABOB and Rainbow/PUSH Comments, filed January 2, 2003 (“Comments”), at 3-4.

¹⁷“Radio Local Market Consolidation & Minority Ownership” (“Radio Local Market Study”), prepared by Kofi A. Ofori. NABOB’s current data shows that its is now approximately 20% for African American station owners.

¹⁸Comments at 6-10.

¹⁹Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming?, Christine Bachen, et al., December, 1999 at 37. (Incorporated herein by reference.)

Diversity of Programming Study concluded that there is “empirical evidence of a link between race or ethnicity of broadcast station owners and contribution to diversity of news and public affairs programming across the broadcast spectrum.”²⁰

NABOB and Rainbow/PUSH demonstrated that only ownership diversity can provide the type of meaningful diversity that will promote the First Amendment policies of the Commission. We showed that a single entity owning stations broadcasting in a variety of entertainment formats does not provide the type of diversity that the Commission’s ownership rules are designed to promote. The ownership rules are primarily intended to promote opinion diversity, and only secondarily entertainment diversity. We showed that the Commission should adopt policies which will diversify ownership of broadcast stations.²¹

With the exception of the Commission’s adoption of the Arbitron market definition to define radio markets, the Commission rejected all of NABOB’s proposals, and instead deferred consideration of them until such time as the Commission adopts an NPRM to consider proposals to promote minority ownership. As Commissioner Copps noted in his dissenting statement, “Minority ownership is vitally germane to this proceeding. I fail to see how we can perpetuate diversity of viewpoint, for example, without addressing minority ownership. Ownership matters to diversity. The issue of its impact on women and minorities should not be relegated to a Further Notice at some indeterminate time.”

²⁰Diversity of Programming Study at i, cited at Comments at 10-13.

²¹Comments at 13-17.

VII. THE COMMISSION SHOULD RETAIN ITS MULTIPLE OWNERSHIP RULES

NABOB and Rainbow/PUSH demonstrated in 2003 that it is the market power of the large media owners which has caused the drop in minority ownership since 1996. NABOB and Rainbow/PUSH showed that changes in any of the Commission's ownership rules, to allow further concentration of media ownership, will cause further erosion in minority ownership. NABOB and Rainbow/PUSH have, therefore, opposed any relaxation of the Commission's ownership rules.

NABOB and Rainbow/PUSH demonstrated in our Comments that the loss of minority ownership since the 1996 relaxation of the Commission's ownership rules requires retention of the Commission's remaining ownership rules. The Commission's 2003 Order relaxed or repealed most of the Commission's cross-media ownership rules. In particular, by eliminating the radio-television and newspaper-broadcast cross-ownership rules, the Commission would have further decreased the limited opportunities for increased ownership of radio and television stations by minorities. The consolidated market power of the television-radio-newspaper combinations that would have been formed would have severely overwhelmed new entrants seeking to purchase stations and existing owners trying to operate stations in markets where such combinations are formed. The net effect upon minority ownership would have been to worsen a situation which has already reached the crisis stage.

VIII. CONCLUSION

NABOB and Rainbow/PUSH submit that the Commission cannot adopt rule changes in manner that will meet the requirements of the Court's remand decision on the basis of comments received in this proceeding until the Commission completes the studies set forth above. The

Commission must develop such studies and then make them available for public comment. Absent such a procedure, any resulting rule changes will be unable to meet the standard of review set forth by the Court. In addition, the Commission should review the record information that was not adequately considered by the Commission in 2003, in particular, the evidence demonstrating, as the Court noted, that market share information should continue to be used to review radio assignment and transfer cases. The Commission should also act upon the issues raised in NABOB and Rainbow/PUSH's Petition for Reconsideration.

Respectfully submitted,

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